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**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554**

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In the Matter of

APPLICATION OF SBC COMMUNICATIONS,)
INC. PURSUANT TO SECTION 271 OF THE)
TELECOMMUNICATIONS ACT OF 1996 TO)
PROVIDE IN-REGION INTERLATA SERVICE)
IN MISSOURI.)

CC Docket No. 01-88

**COMMENTS OF THE MISSOURI
OFFICE OF THE PUBLIC COUNSEL**

**MARTHA S. HOGERTY
PUBLIC COUNSEL**

**MICHAEL F. DANDINO
SENIOR PUBLIC COUNSEL**

Attorneys for the Office of the Public Counsel
650 GOVERNOR OFFICE BUILDING
200 MADISON STREET
POST OFFICE BOX 7800
JEFFERSON CITY MISSOURI 65102
(573) 751-4857
(573) 751-5562 FAX
EMAIL: mdandino@mail.state.mo.us

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**COMMENTS OF THE MISSOURI
OFFICE OF THE PUBLIC COUNSEL**

Summary of Public Counsel's Comments

The Missouri Office of the Public Counsel recommends that the Federal Communications Commission (FCC) deny SBC Communications, Inc.'s Section 271 application for interLATA service authority in Missouri as premature.

SWBT has not established a track record of successful compliance with the approved M2A interconnection agreement for a sufficient time to demonstrate that its Missouri markets are irrevocably open to competition and that it will provide access to its network on a nondiscriminatory basis. Without this evidence, the FCC should not approve the application.

In addition, Public Counsel suggests that the prices in the M2A agreement should be reviewed for reasonableness given the variation in prices between the SWBT's T2A, O2A, K2A, and the M2A. While M2A interim prices are now under review in Missouri cost dockets, Public Counsel still believes that Missouri permanent prices established in

Missouri arbitrations should be adjusted so that they are no higher than in Texas. The FCC's approval of the T2A "set the bar" for reasonableness and fairness of these prices.

Brief history of SWBT's Missouri Section 271 application

On November 20, 1998, SWBT filed its application with the Missouri PSC claiming it complies with Section 271 of the Telecommunications Act of 1996 and should be granted in-region interLATA toll authority. The MOPSC held evidentiary hearings in March, 1999. Public Counsel contended that SWBT did not comply with the Act on at least 8 of the 14 competitive checklist items and could not show that its performance measures and standards were valid. The PSC ordered its Staff and the parties in the proceeding to look to the Texas Section 271 proceedings for these performance measures and standards.

In June, 2000, SWBT filed supplemental information to update its pending application and also filed a "M2A" interconnection agreement as its support for Section 271 compliance. This process of presenting a model interconnection agreement for approval by the Public Service Commission and then make it available to any CLEC in the state was based on the FCC approved Texas application and the "T2A" interconnection agreement. Public Counsel, the PSC Staff, and many CLECs objected that the M2A had terms, conditions, and prices that were inferior to the Texas T2A approved by the FCC. Public Counsel said that the FCC "set the bar" for reasonable compliance with it approval of the T2A and Missouri should not accept less. Public Counsel and the PSC Staff said that even after its supplemental information and the M2A proposal, SWBT did not comply with at least 4 checklist items. The PSC did not hold

trial type evidentiary hearings on the updated application, but rather received written CLEC comments and held question and answer sessions with SWBT, CLECs, the Staff, the Missouri Attorney General, and Public Counsel having an opportunity to make comments and answer questions posed by the Commissioners.

On February 13, 2001, the MOPSC issued an interim order that found that SWBT did not comply with 4 items of the competitive checklist:

1. Nondiscriminatory access to interconnection
2. Nondiscriminatory access to unbundled network elements
3. Nondiscriminatory access to unbundled local loops
4. Nondiscriminatory access to unbundled local transport

The PSC said in that February interim order that if SWBT made available to CLECs a M2A with revisions suggested by the PSC that M2A would satisfy SWBT's legal obligation to provide the competitive checklist on a nondiscriminatory basis at parity with itself and its affiliates. Based upon that M2A, the PSC stated that it could then give its "conditional" approval.

At the request of the PSC, the Staff filed a revised comparative chart of rates in Missouri, Texas, Kansas, and Oklahoma. That chart reflected Missouri rates adjusted in a manner similar to the other states, i.e., incorporation of rates on interim basis or Missouri arbitration rates discounted as occurred in the Kansas and Oklahoma Section 271 applications at the FCC through *ex parte* action by SBC. (Staff's Updated Multi-jurisdictional Comparison of Rates) On February 28, 2001, SWBT filed its revised M2A to conform to the PSC's directives in its February 13, 2001 interim order on the "acceptable" terms, conditions, and prices.

On March 15, 2001, the MOPSC entered its *Order Regarding Recommendation on 271 Application Pursuant to the Telecommunications Act of 1996 and Approving the Missouri Interconnection Agreement (M2A)*. In that order the PSC adopted interim rates, terms, and conditions in the M2A for collocation, line sharing, line splitting, loop conditioning, and unbundled network elements based in part on Texas, Oklahoma and Kansas rates subject to additional proceedings for permanent rates and true-up . Other permanent rates reflected prior rates established by the Missouri PSC in AT&T/SWBT arbitrations. (MOPSC March 6, 2001 *Order Finding Compliance With The Requirements of Section 271 of the Telecommunications Act of 1996*)

The PSC did not require SWBT to operate under the M2A prior to making a finding of compliance. SWBT filed its revised M2A that was the foundation for its legal obligation to provide Section 271 compliant interconnection and resale on February 28, 2001. On March 6, 2001, the MOPSC issued its order finding compliance. Then, on March 15, 2001, the MOPSC issued its final order making a positive recommendation to the FCC for SBC's in-region interLATA service authority in Missouri and approving the M2A. The period for evaluation of SWBT's performance under the approved M2A prior to the positive recommendation was virtually non-existent. This is a stark contrast to the interim order of February 13, 2001 that found, as of that date, SWBT did not fulfill four of the checklist items and could not qualify at that time for Section 271 authority. Public Counsel suggested a reasonable period of at least 90 days to monitor SWBT's performance under the M2A. Through this monitoring period, the PSC could have provided a window to the introduction of record evidence that SWBT in fact complies with the M2A or does not. At that point, the PSC could have made an informed decision

based on evidence in the record of then current compliance rather than promised future compliance. The MOPSC record of the proceedings as it stands before the FCC lacks evidence of SWBT's compliance with Section 271.

The PSC's order making a positive recommendation to the FCC is not supported by evidence that SWBT complies with its legal obligations under the M2A and, therefore, the PSC record now before the FCC lacks evidence of actual compliance with Section 271.

Comments

To obtain Section 271 approval, SWBT must demonstrate in the evidentiary record compiled by the Missouri Public Service Commission:

(1) it is providing the 14 checklist items in Section 271 (c) (2) (B) under a Track

A (Section 271 (a) (1) (A)) state approved interconnection agreement or a Track B

(Section 271 (c) (1) (B)) Statement of Generally Available Terms.

(2) that in-region long distance will be carried out consistent with Section 272

affiliate transaction provisions.

(3) that entry into the in-region interLATA market in Missouri is "consistent

with the public interest, convenience, and necessity" as required by

Section 271 (d) (3) (C).

The FCC has made it clear that it wants a full and complete detailed record for its review. It will "consider carefully state determinations of fact that are supported by a detailed and extensive record...." *Memorandum Opinion and Order, In the Matter of*

Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas, (CC Docket No. 00-65), June 30, 2000 (FCC Texas Order), para. 11; Section 271 (d) (2) B, Federal Telecommunication Act of 1996)

Section 271(d)(2)(B) requires the FCC to "consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c)." 47 U.S.C. Sec.271(d)(2)(B). The explicit role of the Missouri Commission in an application under Section 271(d)(1) is to "consult" with the FCC so as to verify whether SWBT has complied with the requirements of Section 271(c).

Section 271(d)(2)(A) requires that the FCC also notify and consult with the Attorney General regarding any application under Section 271(d)(1). 47 U.S.C. Sec.271(d)(2)(A). The United States Department of Justice ("DOJ") usually requests state commissions to gather certain information to aid the DOJ in the Attorney General's evaluation of the application.

To properly fulfill its role as consultant to the FCC and as an information gatherer for the DOJ on matters related to SWBT's compliance with Section 271, the MOPSC should develop an evidentiary record that provides the necessary facts for the FCC and the DOJ to reasonably make their analysis and reach a final conclusion.

In the *Texas FCC Order*, the FCC set out the role of state commissions:

The evidentiary standards governing our review of section 271 applications are intended to balance our need for reliable evidence against our recognition that, in such a complex endeavor as a section 271 proceeding, no finder of fact can expect proof to an absolute certainty ... (para. 43)

We will look to the state to resolve factual disputes wherever possible. Indeed, we view the state's and the Department of Justice's roles to be similar to that of an "expert witness." Given the 90-day statutory deadline to reach a decision on a section 271 application, **the Commission does not have the time or the resources to resolve the enormous number of factual disputes that inevitably arise from the technical details and data involved in such a complex endeavor.** Accordingly, as discussed above, where the state has conducted an exhaustive and rigorous investigation into the BOC's compliance with the checklist, we may give evidence submitted by the state substantial weight in making our decision. (para. 51) (emphasis added)

In the Order rejecting South Carolina's recommendation of BellSouth's Section 271 application, the FCC emphasized the importance of the record before the state commission:

"On the other hand, we emphasize that parties should make every effort to present their views to the state commission in the first instance, where such views can be adequately addressed by other interested parties and subjected to cross-examination. para. 27 (emphasis added)

Memorandum Opinion and Order, *In the Matter of Application of BellSouth Corporation, et al Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina*, CC Docket No. 97-208 (December 24, 1997).

In rejecting the first SWBT application from Oklahoma, the FCC noted that the Oklahoma Commission failed to substantiate its recommendations when it rejected SWBT's application for InterLATA long distance service in that state. The FCC noted:

Moreover, based on the record before us, we find that it is unclear what standard the Oklahoma Commission applied or what specific facts it relied on in making its determination about Brooks' activities. In its order in the state's section 271 proceeding, the Oklahoma Commission concluded "that Brooks Fiber meets the requirement of [s]ection 271(c)(1)(A) of the Act,"(59) **but did not provide any basis for its determination.** (para 6) (emphasis added)

In its initial comments in this proceeding, the Oklahoma Commission asserts that "Brooks is currently providing local service to business customers predominantly over its own facilities and by resale on a test basis to its employees for their residential service." The Oklahoma Commission contends in its reply comments in this proceeding that "[w]ith respect to the Track 'A' versus Track 'B' issue, the [Oklahoma Commission] has determined that Brooks Fiber is providing both business and residential service. Given the facts in the record before us, the Oklahoma Commission's determination that Brooks 'is providing' residential service could be based on, either cumulatively or individually, a range of factors -- e.g., Brooks' provision of circuits to four employees on a test basis, Brooks' effective state tariff, or service obligations that Brooks has under Oklahoma law. **None of the Oklahoma Commission's statements, either taken together or individually, specifies whether the Oklahoma Commission has made a finding that Brooks is actually furnishing residential service, or otherwise qualifies as a competing provider of residential service.** (para. 16) (emphasis added)

Similarly, **we do not attach significant evidentiary weight to the Oklahoma Commission's unsubstantiated assertion** that "Brooks has begun media advertisements seeking to attract both business and residential customers," **without further elaboration** on the significance of such advertisements. (para 21) (emphasis added)

Memorandum Opinion and Order, *In the Matter of Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Oklahoma*, CC Docket No. 97-121, (June 26, 1997)

The Missouri Public Service Commission has fallen short on its obligation by not requiring a monitoring period and then creating a record of the results so that the FCC and the DOJ can properly judge SWBT's actual performance under the M2A rather than just its commitment to perform. The record before the FCC lacks the evidence necessary to determine whether SWBT is in fact providing interconnection and resale under Section 271 and the M2A and, therefore, the application is fatally flawed.

The Missouri Public Service Commission (MOPSC) has taken great strides to create a record for the FCC to review for its determination on whether SBC

Communications, Inc. has complied with Section 271 and Section 272 requirements for in-region interLATA service authority. The MOPSC provided a fair and adequate opportunity for parties to present evidence in support and in opposition to the application. The MOPSC evaluated the facts and properly found that SBC's application fell short of full compliance with all of the 14 checklist items needed before in-region interLATA toll service is authorized for SWBT in Missouri. (Missouri Section 271 proceedings Case No. TO-99-227, Transcript p. 3120 – 3127, hereinafter referenced as “Tr.”) But rather than just leave the issue at that point, the MOPSC fashioned a tentative position that set out the direction the PSC was considering for its final recommendation. It then sought the reaction and input of SWBT and the other parties so that the PSC could draw a road map for compliance. With that road map, SWBT could modify its position and its proposed M2A interconnection agreement to attempt to meet the Commission's formula to comply with the 14 checklist items and the public interest analysis demanded by the Federal Telecommunication Act of 1996. (Tr. 3127-3128)

Public Counsel suggested to the MOPSC that after a revised M2A acceptable to the PSC was approved, adopted by SWBT, and then actually offered to CLECs, the PSC should maintain a monitoring period. The PSC then could have an adequate opportunity to see the M2A and SWBT in operation prior to the PSC finally voting on its recommendation on SWBT's application. There was a continuous concern not only by Public Counsel, but also the Attorney General for the State of Missouri, that the law requires SWBT to demonstrate its actual operation under a Section 271 compliant interconnection agreement. The CLECs also expressed concern that SWBT must demonstrate compliance under the M2A interconnection agreement prior to a favorable

MOPSC recommendation to the FCC. (Tr. 3230-3236; 3259; 3338-3340; 3341-3342) In the January 31, 2001 MOPSC question and answer session, CLEC McCleod asked the PSC to note the Missouri CLECs' experience with SWBT as an example of the importance of examining actual compliance. SWBT disputed the CLECs' right to participate in the Metropolitan Calling Area Plans in St. Louis, Kansas City, and Springfield at parity with SWBT until the PSC ruled in the CLECs favor. (Tr. 3230-3236)

In its examination of the evidentiary record, the MOPSC tentatively found that SWBT's operation under the existing interconnection agreements did not comply with the Section 271 competitive checklist. (*Interim Order Regarding The Missouri Interconnection Agreement*, February 13, 2001). It also found in that order that the M2A as revised to date was not a competitive checklist compliant interconnection agreement. At that point, the record in the Missouri proceedings and the findings of the MOPSC were clear: SWBT did not comply with the Section 271 requirements.

To give SWBT with a road map to attain MOPSC approval and a favorable FCC recommendation, the MOPSC suggested modifications to the M2A in the *Interim Order*. If SWBT agreed to make these modifications, the MOPSC would find that the revised M2A interconnection agreement was in compliance with Section 271. At that point in the required legal analysis for Section 271 approval, SWBT only then had a fixed legal obligation to provide interconnection and resale on nondiscriminatory basis. With that "conditional approval," SWBT made the terms, conditions, and prices of this revised M2A available to CLECs in Missouri.

The Missouri PSC looked at SWBT's legal commitment to make the revised and approved M2A available as the final step to gaining its recommendation for approval.

(Order Finding Compliance with the Requirements of Section 271 of the Telecommunications Act of 1996, March 6, 2001) It is on this finding and on this evidentiary record that the Missouri Public Service Commission made its finding that SWBT complied with Section 271 and recommended that the FCC approve the application. *(Order Regarding Recommendation On 271 Application Pursuant to The Telecommunications Act of 1996 and Approving the Missouri Interconnection Agreement (M2A), March 15, 2001)*

Public Counsel suggests that the actual finding that SWBT operates and continues to operate under the Section 271 compliant M2A was not made and in fact could not have been made. The next logical step in the analysis and in the evaluation process would be to see the agreement in place under operational conditions for a sufficient period of time prior to the PSC voting on final approval. (Tr. 3265-66; 3320-21) This operational period would provide a track record for the PSC to monitor performance of SWBT under the approved M2A. With this monitoring period, performance, not promises, would become the focus of the evaluation to determine whether SWBT had indeed opened up its local market irrevocably to competition.

The transcript before the MOPSC indicates that such a process was at the time of the question and answer session contemplated by SWBT and the PSC:

COMMISSIONER SCHEMENAUER: Then, finally, having the M2A as modified by whatever transpires, I guess, should be available prior to--should be available in Missouri prior to the Commission giving a positive recommendation to the FCC, and you wouldn't have any objections to that?

MR. LANE: I guess it depends on what's meant by that. What we would do is we would make the M2A available immediately upon the Commission determining that it was sufficient to recommend 271 approval. We would make it available immediately at that point.

We would then go to the FCC, after we prepared all of the necessary paperwork, and the Commission could monitor our performance under the M2A just as it's been able to modify our - monitor our performance under all the interconnection agreements that we've been operating under for the last three-plus years.

COMMISSIONER SCHEMENAUER: I think one of the Commissioners suggested that the Commission would give conditional approval, and within 90 days if the M2A was satisfactorily in place, not necessarily being adopted, but if it was available, the Commission could give final approval, and you didn't have any objection to that?

MR. LANE: No. That's - - that's my understanding, and that - - that's acceptable. (Tr. 3265-66)

Concerns on Missouri Pricing

The key question is why should the Federal Communications Commission accept material price differentials in the M2A and the T2A as approved by the FCC? The answer is obvious: it should not accept it. The answer is an equally obvious "No" to the question of whether it is in the best interest of the consumers of the state of Missouri to have CLECs operate under significantly less favorable prices as approved in another state in the same region served by SWBT. There is no persuasive evidence in the record to adequately explain the material differences in prices in the M2A and the T2A. (Tr. 2248-49) Deviations of magnitudes in excess of 10% require significant justification. (Tr. 2250; 2260; 2257; 2255-56; 2253-54; 2277)

The T2A started with the AT&T interconnection agreement in Texas as the base document. Through a two-year collaborative process, improvements were made to the agreement so a document, not perfect from the viewpoint of every party, but a work product of the process, was approved. This was not just the insertion of previous decisions and rates made by the Texas PUC in arbitration cases, but a re-examination of those results for possible barriers to entry and anti-competitive aspects. (Tr. 2252). SWBT's formula for the M2A was to take some portions of the T2A (but not all of them,

such as collocation tariff), add a few it did not get in Texas (deposits for some CLECs) and insert some of the prices from the PSC AT&T arbitration. Some other modifications were included only after CLECs wanted the same deal as reflected in the side agreements SWBT had with Birch Telecom and Covad to secure their support of the application. (Tr. 2236-2241)

The FCC should required that the Missouri interconnection agreement (M2A) be at least as favorable to competition as the T2A as finally adopted by the FCC. That is the standard which should set the mark for reasonable prices. The Missouri market should have the same pricing benefits to promote competition and to irrevocably open the market to effective competition.

Conclusion

For the foregoing reasons, the Missouri Office of the Public Counsel asks the Federal Communications Commission to deny the application.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

BY:



Michael F. Dandino (MBE No. 24590)

Senior Public Counsel

200 Madison Street, Box 7800

Jefferson City, MO 65102

Telephone: (573) 751-5559

Facsimile: (573) 751-5562

E-mail: mdandino@mail.state.mo.us

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed or hand delivered this 24th day of April, 2001 to the attorneys of record listed:

Ms. Janice Myles
Policy & Program Planning Division
Carrier Bureau
Office of the Federal Communications Commission
445 12th Street, S.W., Room 5-C327
Washington DC 20554

Magalie Roman Salas, Secretary
Office of the Federal Communications
Commission
445 12th Street, S.W.
Room TW-B204
Washington DC 20554

Layla Seirafi
U.S. Department of Justice
Antitrust Division
Telecommunications Task Force
1401 H Street, N.W. Suite 8000
Washington DC 20005

Paul G.Lane/Leo J. Bub/
Anthony K. Conroy/Diana Harter
Southwestern Bell Telephone Co.
One Bell Center, Room 3520
St. Louis MO 63101

Nathan Williams
Assistant General Counsel
Missouri Public Service Commission
P. O. Box 360
Jefferson City MO 65102

A handwritten signature in black ink, appearing to read 'Nathan Williams', is written over a horizontal line.